No. 16055

United States
Court of Appeals
for the Ninth Circuit

THE ANACONDA COMPANY, a corporation,
Appellant,

vs.

BUTTE MINERS UNION No. 1 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, et al.,
Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Montana

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—8-25-58

No. 16055

United States
Court of Appeals
for the Ninth Circuit

THE ANACONDA COMPANY, a corporation,
Appellant,

vs.

BUTTE MINERS UNION No. 1 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, et al.,
Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Montana

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

W. M. KIRKPATRICK,
P. L. MacDONALD,
SAM STEPHENSON, JR.,
JOSEPH B. WOODLIEF,
R. LEWIS BROWN, JR.,
WILLIAM J. KELLY,
Hennessy Building,
Butte, Montana,

Attorneys for Appellant.

NATHAN WITT,
P. O. Box 156,
New York 23, New York,

Attorney for Appellees.

United States District Court, District of Montana, Butte Division

No. 596

BUTTE MINERS' UNION No. 1 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association; ANACONDA MILL AND SMELTERMEN'S UNION No. 117 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association; GREAT FALLS MILL AND SMELTERMEN'S UNION No. 16 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association; THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association, Plaintiffs,

vs.

THE ANACONDA COMPANY, a corporation, Defendant.

COMPLAINT

The plaintiffs complain of the defendant, and for cause of action allege:

I.

The action arises under the Act of June 23, 1947, 61 Stat. 156, 29 U. S. C. 185, as hereinafter more fully appears;

II.

That plaintiff Butte Miners' Union No. 1 of the International Union of Mine, Mill and Smelter Workers, hereinafter referred to as Butte Miners' Union No. 1, is an unincorporated association; that plaintiff Anaconda Mill and Smeltermen's Union

No. 117 of the International Union of Mine, Mill and Smelter Workers Union, hereinafter referred to as Anaconda Mill and Smeltermen's Union No. 117 is an unincorporated association; that plaintiff Great Falls Mill and Smeltermen's Union No. 16 of the International Union of Mine, Mill and Smelter Workers, hereinafter referred to as Great Falls Mill and Smeltermen's Union No. 16, is an unincorporated association; that plaintiff International Union of Mine, Mill and Smelter Workers is an unincorporated association; that defendant Anaconda Company is a corporation incorporated in the State of Montana and qualified to do business in the State of Montana;

III.

That plaintiffs, Butte Miners' Union No. 1, Anaconda Mill and Smeltermen's Union No. 117, Great Falls Mill and Smeltermen's Union No. 16 are labor organizations maintaining their principal offices in the District of Montana; that plaintiff International Union of Mine, Mill and Smelter Workers is a labor organization maintaining its principal office in Denver, Colorado, whose duly authorized officers and agents are engaged in representing and acting for the employee members within the District of Montana. The suit is for violations of contract between the defendant Anaconda Company and employer and plaintiffs as labor organizations representing employees of the Anaconda Company and in an industry affecting commerce as defined by Chapter 7 of the National Labor Relations Act, 29 U. S. C., Section 160, et seq.

IV.

That the defendant Anaconda Company operates plants and mines at Butte, Anaconda and Great Falls, Montana; that the bargaining agent for all employees subject to the jurisdiction of the Butte Miners' Union No. 1 in the Butte operations of the defendant company is the plaintiff Butte Miners' Union No. 1 and plaintiff International Union of Mine, Mill and Smelter Workers; that the bargaining agent for all employees of the defendant company subject to the jurisdiction of the Anaconda Mill and Smeltermen's Union No. 117 at the Anaconda operations of the defendant company is the plaintiff Anaconda Mill and Smeltermen's Union No. 117 and plaintiff International Union of Mine, Mill and Smelter Workers; that the bargaining agent for all employees subject to the jurisdiction of the plaintiff Great Falls Mill and Smeltermen's Union No. 16 is the plaintiff Great Falls Mill and Smeltermen's Union No. 16 and plaintiff International Union of Mine, Mill and Smelter Workers;

V.

That negotiations between the plaintiff unions and the defendant company are carried on between the said plaintiff unions and defendant company through a Joint Negotiating Committee made up of members representing each of the said plaintiff unions, and that existing contracts between the plaintiff unions and the defendant company, and changes in individual contracts between the defendant company and the individual plaintiff unions

are and have been for a long time past, arrived at through negotiations between the defendant company and the said Joint Negotiating Committees; that there are now in existence, and have been for a long time past, contracts between the respective plaintiff unions and the defendant company covering working conditions and wages at each of said plants, said agreements being at all times material hereto in full force and effect; that all of the said contracts between the said plaintiffs and the defendant company contain provisions for the establishment of grievance committees representing employee members of the individual plaintiff unions, and prescribing the method of processing said grievances; that all of said agreements provide that if grievances can not be settled between defendant company and the individual plaintiff unions, then the subject matter of the grievances shall be submitted to arbitration; that copies of the portions of said agreements relating to grievance procedures and to arbitration are attached as Exhibits A, B and C and are by this reference made a part of this Complaint;

VI.

That there are, and at all times material to this action have been in existence, pension plan agreements between the plaintiff unions on the one hand and the defendant company on the other hand, said pension plan agreements having been negotiated by the Joint Negotiating Committee referred to above and the defendant company, and that except for the parties and for certain provisions not here material

in the contract covering the Butte operations, said pension agreements and pension plans are identical;

VII.

That under said pension agreements, eligible employee members of the plaintiff unions may retire under the terms specified in said agreements and are then entitled to draw certain pension payments as in the agreements set out; that disputes have arisen between the plaintiff unions and the defendant company on the termination of employment of member employees who are not eligible for pensions within the said agreements upon the attainment of said member employees of the age of 68 years, it being the contention of the plaintiff unions that Section 2.1(c) of each of said pension agreements has application only to employee members who are eligible for pension, said provision reading:

"2.1(c)—Notwithstanding the provisions of Subsection 2.1(a) on and after November 1, 1954, an employee's service shall continue beyond the first day of the month following his 68th birthday only at the written request of the company."

Section 2.1(a) of each pension agreement reads:

"2.1(a) Normal: On and after the effective date of the plan an employee may retire from the service of the employing company on his normal retirement date which shall be the first day of the month following his 65th birthday. An employee may con-

tinue to work beyond his normal retirement date, provided he is able, in the opinion of the Company, to perform the work available.

"No employee who retires for age shall become a pensioner unless he has completed fifteen or more years of continuous service to his retirement."

That in each of the defendant company's plants, as listed above, the defendant company has adopted a policy of terminating, and is terminating, the employment of member employees upon their attainment of the age of 68 even though the said employee members are not eligible for pension; that at each of the said plants the plaintiff unions representing the employee members have listed said terminations as grievances; that at each of said plants the defendant company has denied relief on these claims through the grievance procedures; that at each of said plants the plaintiff unions have demanded arbitration of the individual disputes but that the said defendant company has refused to submit the individual grievances to arbitration and has, and still does, take the position that the provisions of the pension plan and their application are not subject to arbitration.

The plaintiffs allege that the disputes arising from the termination of employment of employees over 68 years of age are not eligible for pension are proper subjects of the grievance procedure and of arbitration, and that the defendant company is required by its agreements with the plaintiffs to submit grievances arising out of the termination of

employment of employee members not eligible for pension under said Section 2.1(c) of the pension agreements to arbitration.

Wherefore, plaintiffs demand judgment that defendant company be required to handle disputes arising out of the termination of employment of employee members not eligible for pension as grievances and to arbitrate said unsettled grievances as provided in said contracts referred to in Paragraph V above, and for their costs.

Dated this 18th day of October, 1957.

/s/ LEIF ERICKSON,
NATHAN WITT,
Attorneys for Plaintiffs.

EXHIBIT "A"

Excerpts Current Contract Between Butte Miners' Union No. 1, of the International Union of Mine, Mill and Smelter Workers and International Union of Mine, Mill and Smelter Workers and the Anaconda Company.

"16.

Grievances:

As a representative or representatives of the employees, the Company will recognize the Mine Grievance Committees in the Butte mines. The Mine Grievance Committee shall consist of not more than one employee for each working level in each operating mine and in each zone in the Kelley

Exhibit "A"—(Continued)

Mine, unless a larger number shall be mutually agreed upon between the Company and the Union. All members of such Grievance Committees shall be members of Butte Miners' Union No. 1, who shall be selected for each mine from members of said Union there employed, in such manner as the employees at each mine shall elect. In selecting members of the Mine Grievance Committees consideration should be given to their occupations so as to interfere with production as little as possible. A Committee member shall continue to serve as such only as long as he continues to be an employee of said mine. The duties of the Mine Grievance Committees shall be confined to the adjustment of disputes between the mine management and the miner or miners. The Mine Grievance Committees in the discharge of their duties shall under no circumstances go around the mine to the various working places for any cause except as permitted by their immediate supervisors. The Committee shall have the right to take up a grievance only before or after regular working hours, except as provided above, and the Company will have its representative on hand at such times.

Any grievance or misunderstanding concerning any rule, practice or working condition, including the contract system, or any other grievance which cannot be settled on the job between any employee and his immediate supervisor, must be then taken up with the Foreman or Mine Superintendent, by said employee or his representative; provided, how-

Exhibit "A"—(Continued)

ever, that no grievance shall be taken up for investigation or adjudgment where the employee or employees involved discontinue work before the procedure for adjusting grievances set forth herein has been complied with. This limitation shall not apply to employees who have been discharged or in cases where the safety of the employee is involved.

In case of disagreement as to any facts existing on the ground, not more than two members of the Committee and the employee or employees involved may accompany the Foreman or Mine Superintendent or their representatives to the working place to make any necessary examination. Such examination may be made at the start of the next working shift or as soon thereafter as practicable.

In case a settlement cannot be made, the subject matter which caused the grievance must be presented in writing by the Union within seventy-two (72) hours, excluding Saturdays, Sundays, and holidays, to the office of the Labor Commissioner of the Company. In case a settlement cannot be made in the office of the Labor Commissioner, the subject matter which caused the grievance must be taken up at the next Contact Meeting between the Company and the Union.

If the grievance is not settled as hereinbefore provided, it may within seven (7) days be referred to a committee composed of three (3) representatives from each party. If this committee cannot resolve the grievance, the committee shall write down the question to be submitted to arbitration. Within

Exhibit "A"—(Continued)

ten (10) days the parties shall attempt to agree upon an arbitrator. In the event they fail to agree upon an arbitrator, the parties agree to use the facilities of the American Arbitration Association for the selection of an arbitrator. All decisions rendered as a result of any arbitration proceedings provided for herein shall be final and binding upon both parties. Each party shall pay its own expenses in connection with said arbitration proceedings, except that expenses of the arbitrator or arbitrators shall be paid for equally by both parties.

17.

Subjects and Expenses of Arbitration:

No question of a change in the wage scale or differentials shall be the subject of arbitration. The fees and expenses of such arbitrator shall be borne equally by the Union and the Company."

EXHIBIT "B"

Excerpts Current Contract Between Anaconda Mill and Smeltermen's Union No. 117 of the International Union of Mine, Mill and Smelter Workers and International Union of Mine, Mill and Smelter Workers and the Anaconda Company.

"19.

Grievances:

Any grievance or misunderstanding concerning any rule, practice or working condition, or any other grievance which cannot be settled on the job

Exhibit "B"—(Continued)

between any employee and his employer, must be first taken up with the Management by said employee or his representative, and in case a settlement cannot be made, the subject matter which caused the grievance must be taken up with a committee representing the Union and a committee of the Company.

In case of disagreement as to any facts existing on the ground, the Union committee or its representative may, with a representative of the Company, make any necessary examinations at the working place involved.

If the grievance is not settled as hereinbefore provided, it may within seven (7) days be referred to a committee composed of three (3) representatives from each party. If this committee cannot resolve the grievance, the committee shall write down the question to be submitted to arbitration. Within ten (10) days the parties shall attempt to agree upon an arbitrator. In the event they fail to agree upon an arbitrator, the parties agree to use the facilities of the American Arbitration Association for the selection of an arbitrator. All decisions rendered as a result of any arbitration proceedings provided for herein shall be final and binding upon both parties. Each party shall pay its own expenses in connection with said arbitration proceedings, except that expenses of the arbitrator or arbitrators shall be paid for equally by both parties.

During the pendency of such grievance either party to this agreement may avail itself of the serv-

Exhibit "B"—(Continued)

ices of the conciliation or mediation channels provided by the United States Government.

It is understood and agreed that when any question or grievance arising between the Company and the Union which cannot be settled under the provisions of this agreement is submitted by the Union to a vote of its members, only those members of the Union involved in and directly affected by the issue in question and employed by the Company at the time the vote is taken, or within six (6) months prior thereto, and in good standing with the Union, shall have the right to vote thereon.

20.

Subjects and Expenses of Arbitration:

No question of a change in the wage scale or differentials shall be the subject of arbitration. The fees and expenses of such arbitrator shall be borne equally by the Union and the Company."

EXHIBIT "C"

Excerpts Current Contract Between Great Falls Mill and Smeltermen's Union No. 16 of the International Union of Mine, Mill and Smelter Workers and International Union of Mine, Mill and Smelter Workers and the Anaconda Company.

"19.

Grievances:

Any grievance or misunderstanding concerning any rule, practice or working condition, or any other grievance which cannot be settled on the job

Exhibit "C"—(Continued)

between any employee and his employer, must be first taken up with the management by said employee or his representative, and in case a settlement cannot be made, the subject matter which caused the grievance must be taken up with a committee representing the Union and a committee of the Company.

In case of disagreement as to any facts existing on the ground, the Union committee or its representative may, with a representative of the Company, make any necessary examinations at the working place involved.

If the grievance is not settled as hereinbefore provided, it may within seven (7) days be referred to a committee composed of three (3) representatives from each party. If this committee cannot resolve the grievance, the committee shall write down the question to be submitted to arbitration. Within ten (10) days the parties shall attempt to agree upon an arbitrator. In the event they fail to agree upon an arbitrator, the parties agree to use the facilities of the American Arbitration Association for the selection of an arbitrator. All decisions rendered as a result of any arbitration proceedings provided for herein shall be final and binding upon both parties. Each party shall pay its own expenses in connection with said arbitration proceedings, except that expenses of the arbitrator or arbitrators shall be paid for equally by both parties.

During the pendency of such grievance either party to this agreement may avail itself of the serv-

Exhibit "C"—(Continued)

ices of the conciliation or mediation channels provided by the United States Government.

It is understood and agreed that when any question or grievance arising between the Company and the Union which cannot be settled under the provisions of this agreement is submitted by the Union to a vote of its members, only those members of the Union involved in and directly affected by the issue in question and employed by the Company at the time the vote is taken, or within six (6) months prior thereto, and in good standing with the Union, shall have the right to vote thereon.

20.

Subjects and Expenses of Arbitration:

No question of a change in the wage scale or differentials shall be the subject of arbitration. The fees and expenses of such arbitrator shall be borne equally by the Union and the Company."

[Endorsed]: Filed October 21, 1957.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, The Anaconda Company, a corporation, and for answer to the complaint admits, denies and alleges as follows:

First Defense

The Complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

1. Admits the allegations of paragraphs numbered I, II, III, IV, V and VI.

2. Answering the allegations contained in paragraph numbered VII admits that under said pension agreements, eligible employee members of the plaintiff unions may retire under the terms specified in said agreements and are then entitled to draw certain pension payments as in the agreements set out, and in connection therewith alleges that all employee members of plaintiff unions may be retired, at the option of defendant, not later than the first day of the month following their 68th birthday and may or may not be entitled to draw pension payments; admits that disputes have arisen between plaintiff unions and the defendant company on the termination of employment of member employees who are not eligible for pensions within the said agreements upon the attaining of said member employees of the age of 68 years; admits that it is the contention of the plaintiff unions that Section 2.1 (c) of each of said pension plan agreements has application only to employee members who are eligible for pension, and in connection therewith defendant alleges that said Section 2.1 (c) of each of said pension agreements has application to all employees of defendant who are represented by plaintiffs; admits that Sections 2.1 (c) and 2.1 (a) of said pension plan agreements provide:

"2.1 (c)—Notwithstanding the provisions of Sub-

section 2.1 (a) on and after November 1, 1954, an employee's service shall continue beyond the first day of the month following his 68th birthday only at the written request of the company."

"2.1 (a) Normal: On and after the effective date of the plan an employee may retire from the service of the employing company on his normal retirement date which shall be the first day of the month following his 65th birthday. An employee may continue to work beyond his normal retirement date, provided he is able, in the opinion of the Company, to perform the work available.

"No employee who retires for age shall become a pensioner unless he has completed fifteen or more years of continuous service to his retirement."

Admits that in each of the defendant company's plants the defendant company has adopted a policy of terminating, and is terminating, the employment of member employees upon their attainment of the age of 68 even though the said employee members are not eligible for pension; that at each of the said plants the plaintiff unions representing the employee members have listed said terminations as grievances; that at each of said plants the defendant company has denied relief on these claims through the grievance procedures; that at each of said plants the plaintiff unions have demanded arbitration of the individual disputes but that the said defendant company has refused to submit the individual grievances to arbitration and has, and still does, take the position that the provisions of the

pension plan and their application are not subject to arbitration. Denies that the disputes arising from the termination of employment of employees over 68 years of age are not eligible for pension are proper subjects of the grievance procedure and of arbitration, and that the defendant company is required by its agreements with the plaintiffs to submit grievances arising out of the termination of employment of employee members not eligible for pension under said Section 2.1 (c) of the pension agreements to arbitration. Denies each and every allegation, each and every part thereof and the whole thereof contained in paragraph numbered VII. not herein specifically admitted.

3. Denies each and every allegation, each and every part thereof and the whole thereof contained in said complaint not herein specifically admitted.

Third Defense

For further and separate and affirmative defense to the complaint herein, defendant alleges:

1. That disputes exist between plaintiffs and defendant over the retirement of employees over the age of 68 years, which disputes arise out of the interpretation of the pension plan agreements and amendments thereto between the parties to this action, copies of said agreements and amendments being attached hereto as Exhibits A, B, C, D, E, F, G, H and I, and by this reference made a part hereof.

2. That said disputes are not subject to or covered by the provisions of the collective bargaining

agreements between the parties to this action with regard to working conditions and wages, copies of said agreements being attached hereto as Exhibits J, K and L, and by this reference made a part hereof.

3. That said pension plan agreements and amendments are distinct and separate documents which are not to be considered part of, collateral or supplemental to said collective bargaining agreements, or any other collective bargaining agreements, and the application, interpretation and operation of said pension plan agreements are expressly not subject to the provisions of said collective bargaining agreements; that Section 9, as amended, of each pension plan agreement entitled "Independence of Plan and Pension Plan Agreement," reads as follows:

"Section 9. Independence of Plan and Pension Plan Agreement.

"Notwithstanding anything to the contrary herein or elsewhere contained or implied, the Plan and this Agreement together constitute the Pension Plan provided for in Section V of the Supplementary Agreement between the parties dated November 13, 1951, and the entire agreement and understanding of the parties with respect to such Section V. This Agreement is a distinct and separate document, which, it is agreed, is not to be and shall not be construed to be a part of, or collateral or supplemental to any collective bargaining agreement between the Company and the Union."

4. That Sections 2.1 (a) and 2.1 (c) of said pension plan agreements apply to and cover all employees of defendant, as defined in Section 1.8 of said pension plan agreements, who reach their 68th birthday regardless of whether or not said employees fulfill other requirements or are entitled to pension benefits under said agreements; that Section 1.8 provides as follows in each pension plan agreement:

"1.8 'Employee' means any person who is regularly employed by an Employing Company and who is in a bargaining unit for which a Pension Agreement was executed, or is a member of a group of persons to whom the benefits of this Plan have been made available by designation by the Employing Company; but the term does not include any person engaged on a temporary, casual or part-time basis. The term shall include, upon his return, any person formerly on the payroll, who on the effective date of the Plan was not actively at work because of illness or disability, provided he reports for work promptly upon his recovery and does not take other than casual employment in the intervening period."

5. That the disputes alleged in the complaint are not subject to arbitration under either said pension plan agreements or said collective bargaining agreements.

Wherefore, the defendant denies that plaintiffs are entitled to the relief asked and prays that plain-

tiffs' action be dismissed and that defendant may have and recover its costs and disbursements herein.

Dated this 8th day of November, 1957.

/s/ J. T. FINLEY,
/s/ W. M. KIRKPATRICK,
/s/ P. L. MacDONALD,
/s/ SAM STEPHENSON, JR.,
/s/ JOSEPH B. WOODLIEF,
Attorneys for Defendant.

[Endorsed]: Filed November 8, 1957.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

The defendant, The Anaconda Company, a corporation, moves the Court to enter, pursuant to the provisions of Rule 56 (b) and (c) of the Federal Rules of Civil Procedure, a summary judgment for the defendant dismissing the action on the ground that the pleadings and admissions on file show that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law.

Dated this 24th day of December, 1957.

/s/ J. T. FINLEY,
/s/ W. M. KIRKPATRICK,
/s/ P. L. MacDONALD,
/s/ SAM STEPHENSON, JR.,
/s/ JOSEPH B. WOODLIEF,
Attorneys for Defendant.

[Endorsed]: Filed December 24, 1957.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

The plaintiffs, Butte Miners' Union No. 1 of the International Union of Mine, Mill and Smelter Workers, an unincorporated association, Anaconda Mill and Smeltermen's Union No. 117 of the International Union of Mine, Mill and Smelter Workers, an unincorporated association, Great Falls Mill and Smeltermen's Union No. 16 of the International Union of Mine, Mill and Smelter Workers, an unincorporated association, and the International Union of Mine, Mill and Smelter Workers, an unincorporated association, move the Court to enter, pursuant to the provisions of Rule 56(b) and (c) of the Federal Rules of Civil Procedure, a Summary Judgment for the plaintiffs, dismissing the action on the ground that the pleadings and admissions on file and the Affidavits show that there is no genuine issue as to any material fact and that the plaintiffs are entitled to a judgment as a matter of law.

Dated this 4th day of January, 1958.

NATHAN WITT,
/s/ LEIF ERICKSON,
Attorneys for Plaintiffs.

[Title of District Court and Cause.]

AFFIDAVIT

State of Montana,
County of Silver Bow—ss.

Comes Now Ernest Salvas, who being first duly sworn deposes and says:

That he is and was at all times material hereto the International Representative of the International Union of Mine, Mill and Smelter Workers, and as such, is familiar with the negotiations of contracts and agreements between the plaintiffs and the defendant; that he participated in the negotiation of the current Collective Bargaining Agreement between the plaintiffs and the defendant and in the negotiation of the Pension Agreements and Plans referred to in the pleadings; that prior to January 1, 1955, there was in effect no policy or program of the defendant to retire employees not eligible for pension by reason of their attaining the age of 68 years; that such policy was not adopted and applied until on or about January 1, 1955.

/s/ ERNEST SALVAS.

Subscribed and sworn to before me this 4th day of January, 1958.

[Seal] /s/ LEIF ERICKSON,
Notary Public for the State of Montana, Residing at Helena, Montana. My Commission expires: Sept. 24, 1959.

[Endorsed]: Filed January 6, 1958.

[Title of District Court and Cause.]

MEMORANDUM

This is an action brought by the plaintiffs under the provisions of Section 301 of the Labor-Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C.A., Sec. 185, for specific performance of the arbitration provisions of collective bargaining agreements in an industry affecting commerce. Plaintiffs are the bargaining agents for the miners and mill and smelter workers employed by defendant in its mines at Butte, Montana, and in its smelters at Anaconda and Great Falls, Montana.

Butte Miners' Union No. 1, Anaconda Mill and Smeltermen's Union No. 117 and Great Falls Mill and Smeltermen's Union No. 16, are each affiliated with the International Union of Mine, Mill and Smelter Workers. Each of the three local unions entered into a separate contract with defendant covering "rates of wages, hours of labor, and other conditions of employment" covering miners employed by defendant in its Butte mines and smelter men employed by defendant in its Anaconda and Great Falls smelters respectively. The International Union is also a party to each agreement. The three agreements, which will be hereinafter referred to as the collective bargaining agreements, differ in some respect, but the provisions of each agreement that are relevant and material to this case are identical. Each of the collective bargaining agreements is dated July 1, 1956, and they are effective from July 1, 1956, to June 30, 1959.

[Title of District Court and Cause.]

AFFIDAVIT

State of Montana,
County of Silver Bow—ss.

Comes Now Ernest Salvas, who being first duly sworn deposes and says:

That he is and was at all times material hereto the International Representative of the International Union of Mine, Mill and Smelter Workers, and as such, is familiar with the negotiations of contracts and agreements between the plaintiffs and the defendant; that he participated in the negotiation of the current Collective Bargaining Agreement between the plaintiffs and the defendant and in the negotiation of the Pension Agreements and Plans referred to in the pleadings; that prior to January 1, 1955, there was in effect no policy or program of the defendant to retire employees not eligible for pension by reason of their attaining the age of 68 years; that such policy was not adopted and applied until on or about January 1, 1955.

/s/ ERNEST SALVAS.

Subscribed and sworn to before me this 4th day of January, 1958.

[Seal] /s/ LEIF ERICKSON,
Notary Public for the State of Montana, Residing at Helena, Montana. My Commission expires: Sept. 24, 1959.

[Endorsed]: Filed January 6, 1958.

[Title of District Court and Cause.]

MEMORANDUM

This is an action brought by the plaintiffs under the provisions of Section 301 of the Labor-Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C.A., Sec. 185, for specific performance of the arbitration provisions of collective bargaining agreements in an industry affecting commerce. Plaintiffs are the bargaining agents for the miners and mill and smelter workers employed by defendant in its mines at Butte, Montana, and in its smelters at Anaconda and Great Falls, Montana.

Butte Miners' Union No. 1, Anaconda Mill and Smeltermen's Union No. 117 and Great Falls Mill and Smeltermen's Union No. 16, are each affiliated with the International Union of Mine, Mill and Smelter Workers. Each of the three local unions entered into a separate contract with defendant covering "rates of wages, hours of labor, and other conditions of employment" covering miners employed by defendant in its Butte mines and smelter men employed by defendant in its Anaconda and Great Falls smelters respectively. The International Union is also a party to each agreement. The three agreements, which will be hereinafter referred to as the collective bargaining agreements, differ in some respect, but the provisions of each agreement that are relevant and material to this case are identical. Each of the collective bargaining agreements is dated July 1, 1956, and they are effective from July 1, 1956, to June 30, 1959.

Lincoln Mills, supra, at page 456, the Court said:

"It seems, therefore, clear to us that Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common-law rule, discussed in Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, against enforcement of executory agreements to arbitrate. We would undercut the Act and defeat its policy if we read Sec. 301 narrowly as only conferring jurisdiction over labor organizations.

"The question then is, what is the substantive law to be applied in suits under Sec. 301(a)? We conclude that the substantive law to apply in suits under Sec. 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. * * *"

The Section 301(a) referred to in this quotation is Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C.A. 185, under which the present suit is brought.

Defendant in its brief and oral argument contends that the law of the State of New York is controlling in this case because by a specific provision of the pension agreements New York law is made applicable and controlling in the interpretation of those agreements. However, it is the collective bargaining agreements which must be construed to determine the narrow issue presented in this case, and not the pension agreements. The Court is not here concerned with whether the terminations of

employment in dispute were justified by the provisions of the pension agreements. If an arbitrable issue is found to exist under the collective bargaining agreements, the arbitrator will apply New York law in determining whether the terminations of employments complained of were or were not justified by the provisions of the pension agreements. In construing the collective bargaining agreements with reference to whether an arbitrable dispute exists between plaintiffs and defendant here, the Court, in accordance with Textile Workers v. Lincoln Mills, supra, must apply federal law, of which there seems to be a considerable body already fashioned, and this Court is not faced with the necessity of fashioning any law in this case.

In Local 205, etc. v. General Electric Co., 233 F. (2d) 85, affirmed, 353 U. S. 547, the Court of Appeals for the First Circuit said:

"The scope of an arbitration pledge is solely for the parties to set, and thus the determination of whether a particular dispute is arbitrable is a problem of contract interpretation."

We turn then to the provisions of the collective bargaining agreements with reference to disputes, grievances and arbitration to determine the scope of the arbitration pledge. Except for slight differences in wording between the three agreements, which are not material here, those provisions are:

"Walkouts, Lockouts,

Protection of Property:

"During the life of this agreement the Union

agrees that there shall be no collective cessation of work by the members of the Union on account of any controversy with the Company respecting the provisions of this agreement, or any other controversy that may arise between the parties to this agreement, until and unless all of the means of settling any such controversy under the provisions of this agreement, or otherwise, shall have failed. The Company agrees that it will not lock out the employees covered by this agreement on account of any controversy with the employees respecting the provisions of this agreement, or any other controversy that may arise between the parties to this agreement, until and unless all other means of settling such controversy under the provisions of this agreement, or otherwise, shall have failed; * * *."

"Grievances:

"Any grievance or misunderstanding concerning any rule, practice or working condition, or any other grievance which cannot be settled on the job between any employee and his employer, must be first taken up with the Management by said employee or his representative, and in case a settlement cannot be made, the subject matter which caused the grievance must be taken up with a committee representing the Union and a committee of the Company. * * *"

Then follows various steps to be taken looking toward a settlement of the grievance, the final step of which is arbitration.

"Subjects and Expenses
of Arbitration:

"No question of a change in the wage scale or differentials shall be the subject of arbitration. The fees and expenses of such arbitrator shall be borne equally by the Union and the Company."

Bearing in mind the admonition of Judge Follmer in Insurance Agents International Union v. Prudential Ins. Co., 122 Fed. Supp., 869, 872, that "arbitration is here to stay, and particularly where the parties have elected to submit their differences to it, the courts should not by hair splitting decisions hamstring its operations", we proceed to analyze these provisions of the collective bargaining agreements.

Broader arbitration provisions than those contained in the collective bargaining agreements between plaintiffs and defendant are difficult to imagine. In the preamble to the agreements, it is recited that they are intended to cover rates of wages, hours of labor and other conditions of employment of all men subject to the jurisdiction of the Unions, employed by the Company. Certainly age is a condition of employment. Then the parties mutually agree that there will be no strike or lockout on account of any controversy respecting the provisions of the agreement, or any other controversy that may arise between the parties until and unless all the means of settling the controversy under the provisions of the agreement, or otherwise, shall have failed. Then, in the machinery set up in the agreements for the handling of disputes

under the heading "Grievances" the parties agreed that any grievance or misunderstanding concerning any rule, practice or working condition, or any other grievance which could not be settled on the job, would be taken up in the manner therein provided, the final step of which is arbitration.

Finally, the parties, no doubt realizing that they had used extremely broad language in defining the controversies which were to be the subject of the grievance procedure they set up, themselves excluded the things from arbitration which they desired to exclude when *the* provided "No question of a change in the wage scale or differentials shall be the subject of arbitration."

Argument has been made that the dispute here involved between plaintiffs and defendant is not covered by and embraced within the meaning of the term "grievances", used in the contract. However, this Court agrees with the Court in Timken Roller Bearing Co. v. National Labor Relations Board, 161 F. (2d) 949, 955, that the term "grievances" as used in a collective bargaining agreement is not a word of art and has not connotation differing from its meaning in ordinary use. The dispute in this case is certainly a "grievance" as that term is interpreted and discussed in Douds v. Local 1250, etc., 173 F. (2d) 764, 771. Furthermore, in this case, as in the Timken Roller Bearing case, supra, the contracts contain broader language, "or any other controversy that may arise between the parties".

In view of the broad terms used in the agree-

ments, "any other controversy that may arise between the parties", "any other grievance which cannot be settled on the job", and in view further of the fact that the parties by express provision, excluded from arbitration those matters which they did not desire to arbitrate, the Court is of the opinion that the dispute between the plaintiffs and the defendant is an arbitrable dispute within the meaning of the collective bargaining agreements. The following statement in the case of Signal-Stat Corporation v. Local 475, etc., 235 F. (2d) 298 at 301, sums up precisely the Court's opinion in this case:

"We think the broad arbitration clause in the collective bargaining agreement here involved covers a dispute relating to an alleged breach of the no-strike clause. Under the agreement, 'All disputes, grievances or differences' are arbitrable. We can hardly imagine more broadly inclusive language. This phraseology distinguishes the instant case from Market Electric Products, Inc., v. United Electric, Radio & Machine Workers, supra. To the extent that the other cases cited by plaintiff require a contrary result, we think them erroneous. We think their interpretations of similar arbitration clauses are unduly restrictive and achieve, by indirection, the same result as the old, and now generally rejected, judicial aversion to enforcing arbitration agreements."

Cases like U. S. Steel Corp. v. Nichols, 229 F. (2d) 396 and United Protective Workers v. Ford Motor Co., 194 F. (2d) 997, are different from the

case at bar. In those cases the discharged employees were suing the employers for damages for their discharge which the employer claimed was by virtue of a policy of compulsory retirement plan. In those cases the Courts were called upon to decide the very issue which the arbitrators will be called upon to decide in this case.

Defendant argues that under the express provisions of the pension agreements, only certain controversies that may arise between the parties are arbitrable, and that the present controversy is not one of them. However, as pointed out, the arbitration is not sought under the pension agreements, but under the collective bargaining agreements. It may be that when the controversy comes before the arbitrators, they may find that the pension agreements furnish justification for the terminations of employment complained of, but that is for the arbitrators to decide.

Defendant also seeks some support for its position in the provision of the pension agreements to the effect that such agreements are separate and distinct documents and are not to be construed as a part of or collateral or supplemental to any collective bargaining agreement. This provision of the pension agreements, however, seems to the Court to weaken the position of the defendant, for if the pension agreements could be considered as amending or supplementing the collective bargaining agreements, then they might be considered, as the company urges, in determining whether the present controversy presents an arbitrable issue under the

collective bargaining agreements. Being by their express provisions not amendatory of or supplemental to the collective bargaining agreements, the pension agreements cannot be considered in deciding the issues of arbitrability under the collective bargaining agreements. There is likewise a provision in each of the collective bargaining agreements that "This contract is exclusive for its entire term and not subject to further negotiation and is to cover all contract relations between the parties for its entire term", which prevents any recourse to the pension agreements in determining the question of arbitrability presented here.

There is this additional circumstance which impels the Court to the conclusion it has reached. The pension agreements were all in existence at the time the last collective bargaining agreements with the broad, all inclusive provisions for disposing of controversies and grievances previously pointed out were executed. At that time, had the parties intended to exclude such a controversy as the instant one from the grievance procedures they set up on the ground that it was covered by the pension agreements, as defendant now maintains, it would have been a simple matter to so state in the collective bargaining agreements as they did with respect to questions concerning wage scales and differentials.

It is also urged by defendant that no bona fide dispute exists because the pension plan by its terms requires the termination of employment of employees 68 years of age or older, even though they are

not entitled to a pension. While a frivolous or patently baseless claim should not be ordered to arbitration, Local 205, etc., v. General Electric, 235 F. (2d) 85, the controversy here is not of that type. Indeed, defendant admits that a dispute exists but in effect argues that because it has a defense in the pension agreements to the claim of plaintiffs that it is not a bona fide dispute. The fact that a defense may exist to a claim does not make the claim frivolous or baseless, and the validity of the defense should be decided by the tribunal to which the parties have agreed to submit their disputes—in this case, the arbitrators—and the Court should not usurp that function under the guise of determining whether there is an arbitrable issue.

Finally, it has been suggested by defendant that summary judgment may not be granted to plaintiff in an action seeking specific performance. This rule has its foundation in the fact that summary judgment is granted only when a party is entitled to judgment as a matter of law, whereas, specific performance generally is a remedy equitable in nature to which no one is entitled as a matter of right or of law, but only as he is able to move the conscience of the equity court. Whatever validity such argument may once have had has been destroyed in actions brought under the Labor Management relations act by the Supreme Court's decision in Textile Workers v. Lincoln Mills, supra, and General Electric v. Local 205, etc., supra, where the Supreme Court held that Section 301(a)

of the Labor Management Relations Act furnishes a body of federal substantive law for the enforcement of collective bargaining agreements. It is interesting to note that perhaps the leading decision in this type case, and one cited with approval by the Supreme Court in Textile Workers v. Lincoln Mills, supra,—Judge Wyzanski's decision in Textile Workers Union v. American Thread Co., 113 Fed. Suppl. 137—was decided on motion for summary judgment.

Plaintiffs are ordered to prepare a decree in accordance with the opinion expressed in this memorandum, submit it to counsel for defendant for approval as to form, and present it to the Court for signing within 15 days from the date of receipt of this memorandum.

Dated this 3rd day of March, 1958.

/s/ W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed March 3, 1958.

United States District Court, District of Montana, Butte Division

Civil Action No. 596

BUTTE MINERS' UNION NO. 1 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association; ANACONDA MILL AND SMELTERMEN'S UNION NO. 117 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association; GREAT FALLS MILL AND SMELTERMEN'S UNION NO. 16 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association; THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association, Plaintiffs,

vs.

THE ANACONDA COMPANY, a corporation, Defendant.

JUDGMENT

This cause came on regularly for hearing on the Motions by each of the parties for Summary Judgment on the 6th day of January, 1958, the plaintiffs were represented by their counsel Leif Erickson, Esq., and Nathan Witt, Esq., and the defendant was represented by J. T. Finlen, Esq., W. M. Kirkpatrick, Esq., J. L. MacDonald, Esq., Sam

Stephenson, Jr., Esq., and Joseph B. Woodlief, Esq., and briefs having been submitted and the parties having presented arguments, and the Motions being then submitted to the Court for its consideration and decision, thereafter the Court on the 3rd day of March, 1958, issued its Memorandum and ordered that judgment be entered for the plaintiffs.

Now, Therefore, pursuant to said Order, it is Ordered, Adjudged and Decreed and this does Order, Adjudge and Decree that defendant submit to arbitration in accordance with the grievance and arbitration provisions of the current collective bargaining agreements between the plaintiffs and defendant, the disputes which have arisen between the parties with regard to the termination of employment by defendant of employees represented by plaintiff unions who have reached the age of 68 years and who are not entitled to pension payments under the current pension plan agreements between plaintiffs and defendant, and it is further Adjudged that plaintiffs recover of the defendant costs of this action taxed in the sum of $17.00.

Dated this 31st day of March, 1958.

/s/ W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed and Entered March 31, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Butte Miners' Union No. 1 of The International Union of Mine, Mill and Smelter Workers, an unincorporated association; Anaconda Mill and Smeltermen's Union No. 117 of The International Union of Mine, Mill and Smelter Workers, an unincorporated association; Great Falls Mill and Smeltermen's Union No. 16 of The International Union of Mine, Mill and Smelter Workers, an unincorporated association; The International Union of Mine, Mill and Smelter Workers, an unincorporated association; and to Leif Erickson, 347 North Last Chance Gulch, Helena, Montana, and Nathan Witt, P. O. Box 156, New York 23, New York, their attorneys:

Notice is hereby given that The Anaconda Company, a corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 31st day of March, 1958.

Dated this 25th day of April, 1958.

/s/ W. M. KIRKPATRICK,
/s/ P. L. MacDONALD,
/s/ SAM STEPHENSON, JR.,
/s/ JOSEPH B. WOODLIEF,
/s/ R. L. BROWN, JR.,
/s/ W. J. KELLY,
Attorneys for Defendant.

[Endorsed]: Filed April 25, 1958.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE TRANSCRIPT OF RECORD

The motion of appellant to extend the time within which to file the transcript of record on appeal is hereby granted, and it is

Ordered that the time within which to file the transcript of record on appeal in the above-entitled cause be, and the same is hereby, extended to and including the 24th day of June, 1958.

Dated this 28th day of May, 1958.

/s/ W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed and Entered May 28, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Dean O. Wood, Clerk of the District Court of the United States in and for the District of Montana, do hereby certify to the Honorable, the United States Court of Appeals for the Ninth Circuit, that the foregoing volume consists of the original papers, viz: Judgment Roll, consisting of Complaint, Answer, Motion of Plaintiff for Summary Judgment, Motion of Defendant for Summary Judgment, Memorandum of Judge W. D. Murray, and Judgment; also Notice of Appeal, Designation of Contents of Record on Appeal, and Statements of Points on Appeal, together with the Names and

Addresses of Attorneys, the Petition and Order Extending Time to File Transcript of Record, and Certificate of Clerk, the same being all matters designated by the parties and required by the rule as the Record on Appeal in Case No. 596, Butte Miners' Union No. 1, etc., et al., vs. The Anaconda Company, a corporation.

I certify that the costs of said Transcript amount to the sum of Five and No/100 ($5.00) Dollars, and have been paid by the Appellant.

Witness my hand and the seal of said District Court at Butte, Montana, this 12th day of June A.D., 1958.

[Seal] DEAN O. WOOD,
Clerk,
/s/ By D. F. HOLLAND,
Deputy Clerk.

[Endorsed]: No. 16055. United States Court of Appeals for the Ninth Circuit. The Anaconda Company, a corporation, Appellant, vs. Butte Miners Union No. 1 of the International Union of Mine, Mill and Smelter Workers, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed: June 14, 1958
Docketed: June 20, 1958

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16055

THE ANACONDA COMPANY, a corporation,
Appellant,

vs.

BUTTE MINERS' UNION No. 1 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association; ANACONDA MILL AND SMELTERMEN'S UNION No. 117 OF THE INTERNATIONAL UNION of MINE, MILL AND SMELTER WORKERS, an unincorporated association; GREAT FALLS MILL AND SMELTERMEN'S UNION No. 16 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association; THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, an unincorporated association,
Appellees.

STATEMENT OF POINTS ON APPEAL

Appellant, The Anaconda Company, a corporation, specifies the following points upon which it intends to rely in the appeal in the above-entitled matter:

That the Court erred in entering judgment for the appellees upon appellees' Motion for Summary Judgment for the reason that the pleadings herein show that the appellant is entitled to a judgment upon appellant's Motion for Summary Judgment as a matter of law.

Dated this 17th day of June, 1958.

/s/ W. M. KIRKPATRICK,
/s/ P. L. MacDONALD,
/s/ SAM STEPHENSON, JR.,
/s/ JOSEPH B. WOODLIEF,
/s/ R. LEWIS BROWN, JR.,
/s/ WILLIAM J. KELLY,
Attorneys for Appellant, The Anaconda Company.

[Endorsed]: Filed June 20, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant, The Anaconda Company, a corporation, appellant above named, hereby designates the contents of the record on appeal as the following original documents from the record in the above-entitled matter:

1. Complaint.
2. Answer.
3. Motion for Summary Judgment of Plaintiffs.
4. Motion for Summary Judgment of Defendant.
5. Memorandum of Judge W. D. Murray.
6. Judgment.
7. Notice of Appeal.
8. Designation of Contents of Record on Appeal.
9. Statement of Points on Appeal.

10. Order Extending Time to File Transcript of Record.

Dated this 17th day of June, 1958.

/s/ W. M. KIRKPATRICK,
/s/ P. L. MacDONALD,
/s/ SAM STEPHENSON, JR.,
/s/ JOSEPH B. WOODLIEF,
/s/ R. LEWIS BROWN, JR.,
/s/ WILLIAM J. KELLY,
Attorneys for Appellant, The Anaconda Company.

[Endorsed]: Filed June 20, 1958. Paul P. O'Brien, Clerk.